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VIA ELECTRONIC FILING

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, DC 20554

Re: Re: *Ex parte*, Inter-Carrier Compensation for ISP-Bound Traffic, CC
Docket No. 99-68; Implementation of the Local Competition Provisions of
the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Ms. Dortch:

On Wednesday, September 22, 2004, David Lawson, Sidley Austin Brown & Wood, Robert Quinn and the undersigned, representing AT&T, met with Scott Bergmann, Legal Advisor to Commissioner Jonathan Adelstein, concerning reciprocal compensation under 47 U.S.C. § 251(b)(5) as it relates to ISP-bound traffic. AT&T discussed the points covered in its May 28, 2004 written *ex parte* submission that responds to arguments presented by Verizon/BellSouth in their May 17, 2004 reciprocal compensation "white paper."

Consistent with Section 1.1206 of the Commission's rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-captioned proceeding.

Respectfully submitted,

ATTACHMENT

cc: S. Bergmann

May 28, 2004

SECTION 251(B)(5) APPLIES TO ISP-BOUND TRAFFIC

I. THE VERIZON/BELLSOUTH CLAIM THAT SECTION 251(B)(5) IS LIMITED TO "LOCAL" CALLS BETWEEN LECs IS INCORRECT AND FORECLOSED BY PRECEDENT.

A. The Verizon/BellSouth Construction of § 251(b)(5) Is Incorrect.

- In their May 17 *ex parte* submission in CC Docket Nos. 96-98 and 99-68, Verizon/BellSouth claim that § 251(b)(5) is limited to calls that originate and terminate within a local calling area between two LECs, and that because ISP-bound traffic does not terminate locally, it is beyond the scope of § 251(b)(5). The statutory language contains no such limitations, and Commission and D.C. Circuit precedent foreclose the Verizon/BellSouth claim.
- **The Commission has already held that § 251(b)(5) is not limited to local traffic.** The plain language of § 251(b)(5) imposes a duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." "Telecommunications" is a defined term in the Act which is not limited to local traffic. *See* 47 U.S.C. § 153(43). In the *ISP Remand Order*, the Commission expressly acknowledged what the statute plainly says. The Commission found that "on its face," § 251(b)(5) requires LECs to establish reciprocal compensation arrangements for the transport and termination of all "telecommunications" that they exchange with another carrier, "without exception." *ISP Remand Order* ¶ 31. The Commission explained that "[u]nless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of all telecommunications traffic – i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier." *Id.* ¶ 32; *see also Bell Atlantic*, 206 F.3d 1, 4 (D.C. Cir. 2000) (noting that "§ 251(b)(5) purports to extend reciprocal compensation to all 'telecommunications'").
- The Commission thought that § 251(g) imposed such a "further limitation" with respect to ISP-bound traffic, but the D.C. Circuit rejected the Commission's attempt to use § 251(g) to limit the scope of § 251(b)(5). *WorldCom v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002) (§ 251(g) "is not susceptible to the Commission's reading"). As the court held, § 251(g) operates only to save certain specific, pre-Act consent decrees and FCC regulations from immediate repeal; with respect to ISP-bound traffic, there is no rule to grandfather, because, as of 1996, there was no federal rule governing intercarrier compensation for such traffic. *WorldCom*, 288 F.3d at 432-33. The state of the law after *WorldCom* is clear: § 251(b)(5) applies to all telecommunications, and § 251(g) cannot be used to exempt ISP-bound traffic from the scope of § 251(b)(5).

- The Verizon/BellSouth claim (at 24-26) that the Commission did not repudiate its prior interpretation of § 251(b)(5) as limited to “local” traffic is quite wrong. The Commission affirmatively *amended* its reciprocal compensation rule to apply to all traffic (including information traffic) not covered by § 251(g). This amendment to the rule was necessarily based on the Commission’s view that § 251(b)(5) applied to all traffic, except traffic exempted by § 251(g). Indeed, the Commission explained that it was “modif[ying]” its “analysis and conclusion in the Local Competition Order” that § 251(b)(5) applied only to local traffic, and that it was “correct[ing] that mistake.” *ISP Remand Order* ¶ 46. And the D.C. Circuit likewise recognized that § 251(b)(5) governed ISP-bound traffic, because it cited §§ 251(b)(5) and 252(d)(B)(i) as authorizing bill-and-keep arrangements and providing potential support for future FCC action relating to ISP-bound traffic on remand. *WorldCom*, 288 F.3d at 434.
- **Verizon and BellSouth misread the statutory language.** The Commission’s conclusions in the *ISP Remand Order* regarding the broad scope of § 251(b)(5) were based on the plain language of the statute and cannot now be revisited. The attempts by Verizon and BellSouth to find other sources of limitation on § 251(b)(5) are baseless.
- Verizon/BellSouth argue (at 28) that § 251(c)(2), which obligates *incumbent* LECs to interconnect with requesting telecommunications carriers for, inter alia, “the transmission and routing of telephone exchange service and exchange access,” confirms that § 251(b)(5), which is a duty of *all* LECs and does not contain those terms, is likewise limited to “telephone exchange service” and “exchange access” (with the latter exempted from present application of § 251(b)(5) by § 251(g) “grandfathering”). In fact, § 251(c)(2) undermines these Bells’ argument, because it demonstrates that when Congress wanted to limit an obligation to “telephone exchange service,” it knew how to do so. Congress could have limited § 251(b)(5) to “telephone exchange service,” but instead it used the much broader defined term “telecommunications.” In all events, Verizon/BellSouth do not even attempt to explain how a statutory duty that falls only on incumbent LECs could be read impliedly to limit a separate duty that applies to all LECs.
- Similarly, nothing in § 251(b)(5) requires both parties to the reciprocal compensation arrangement to be LECs. To the contrary, § 251(b)(5) places a duty on each LEC to enter into reciprocal compensation arrangements for the transport and termination of “telecommunications.” Accordingly, under the plain terms of the Act, any carrier that provides telecommunications is entitled to approach a LEC and ask for a reciprocal compensation arrangement, and the LEC has a duty to enter into such an arrangement under § 251(b)(5) for all telecommunications (except telecommunications that remains subject to pre-1996 Act charging rules by virtue of § 251(g)).
- Nor does § 251(b)(5) require every call subject to a reciprocal compensation arrangement to “terminate” on LEC facilities. To the contrary, the Act uses the separate terms “transport” and “termination,” which refer to different functions. On

any given call, a party may perform one or both functions. Indeed, the Commission has expressly recognized that transiting is encompassed within § 251(b)(5). *See TSR Wireless, LLC v. US WEST Communications, Inc.*, 15 FCC Rcd. 11166 (2000), *aff'd Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001). It would be unreasonable in the extreme to read § 251(b)(5) as excluding transiting; Congress could readily foresee that, as the number of carriers expands with the development of competition, situations in which three or more carriers (even three LECs) would carry a single call would become more and more common.

- Verizon/BellSouth's reliance on § 252(d)(2) is misplaced. *See Verizon/BellSouth Ex Parte* at 26, 28. Section 252(d)(2) provides that reciprocal compensation arrangements must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the other carrier's facilities." Nothing in that language requires calls to terminate locally. Rather, the duty applies regardless of where calls terminate (or originate). The Commission has thus held that the terms of § 252(d)(2) establish only that there must be a mutual obligation to pay for the transport and termination of calls, and that compensation cannot be sought for the origination of calls. *See, e.g., Local Competition Order* ¶ 1042; 47 C.F.R. § 51.703(b); *see also Local Competition Order* ¶ 1036 (applying reciprocal compensation for CMRS calls not just locally but throughout an MTA).
- **Verizon/BellSouth's attempts to distinguish *Bell Atlantic* are baseless.** Verizon and BellSouth spend roughly ten pages (31-41) trying to re-open and re-argue the D.C. Circuit's decision in *Bell Atlantic*. The D.C. Circuit's decision is binding on the Commission, and the Commission has no authority to decide that the court was wrong or misinformed in that case.
- The Bells' central argument, consistent with their erroneous view of the statute, is that ISP-bound traffic cannot be governed by § 251(b)(5) because it does not "terminate" on the CLEC's network. *See Verizon/BellSouth Ex Parte* at 31-39 (citing the Commission's jurisdictional cases). This is exactly the same argument the Commission made in the *ISP Declaratory Order* and which it advanced before the D.C. Circuit in *Bell Atlantic*. The D.C. Circuit rejected the argument. As the court concluded, ISP-bound traffic falls within the statute's terms, and it is irrelevant whether the traffic is jurisdictionally interstate or intrastate based on the Commission's traditional end-to-end jurisdictional analysis. Contrary to Verizon/BellSouth's suggestion (at 32 n.27), the court clearly understood that telecommunications in an ISP-bound call continues from the ISP to distant websites, but the court did not view that fact as dispositive (or even relevant) for purposes of § 251(b)(5). *Bell Atlantic*, 206 F.3d at 5. The Commission cited the same jurisdictional precedents to the D.C. Circuit that Verizon and BellSouth rely on here, but the court expressly held that those cases were "not on point." *Id.* at 6-7.
- Indeed, in the *ISP Remand Order* the Commission properly responded to the court's prior holding by abandoning its reliance on the traditional jurisdictional inquiry and

by completely re-evaluating its interpretation of § 251(b)(5). This led to the Commission's recognition that the plain language of § 251(b)(5) extends to all telecommunications (thus making jurisdiction irrelevant). But even if jurisdiction were relevant, it would not help Verizon and BellSouth here, because enhanced service provider traffic has always been the exception to the rule that compensation follows jurisdiction. Under the ESP exemption, this traffic is treated as local. It would be odd to treat this traffic as local for retail purposes but not for intercarrier compensation purposes.

- Verizon and BellSouth also take issue with *Bell Atlantic's* suggestion that ISP-bound traffic is not "exchange access" within the meaning of the statute. *See Bell Atlantic*, 206 F.3d at 7-8; 47 U.S.C. § 153(16). But whether ISP-bound traffic is "exchange access" has no possible relevance. The application of § 251(b)(5) does not turn on whether traffic qualifies as "exchange access." Nor would it be relevant to the application of § 251(g). The D.C. Circuit has already held that § 251(g) merely grandfathered specific rules in existence as of 1996, and the court has expressly found that there was no federal rule governing ISP-bound traffic prior to the Act. Therefore, ISP-bound traffic is not grandfathered under § 251(g), regardless of whether it could be classified as "information access" or "exchange access" (or anything else).
- But ISP-bound traffic cannot be "exchange access" in any event. Exchange access is defined as the "offering of telephone exchange services or facilities for the purpose of origination or termination of telephone toll services." 47 U.S.C. § 153(16). ISPs offer information services, not "telephone toll services," which are defined as telecommunications services. 47 U.S.C. § 153(48); *Non-Accounting Safeguards Order*, 11 FCC Rcd. 21905, ¶ 248 (1996). Indeed, any determination that ISP services are "telephone toll services" (and that ISP-bound traffic is thus "exchange access") would necessarily mean that ISP services are telecommunications services – a determination that would have profound implications for the Commission's ongoing proceedings on wireline broadband services and IP telephony.
- The suggestion by Verizon and BellSouth (at 40 & n.33) that the Commission has already found ISP-bound traffic to be "exchange access" is misleading at best. Verizon and BellSouth neglect to mention that the determination in the *Advanced Services Remand Order* that they cite was vacated by the D.C. Circuit, *see WorldCom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. 2001) (relying on *Bell Atlantic*), which had the effect of reinstating the Commission's determination in the *Non-Accounting Safeguards Order* that ISPs do not use "exchange access." The Commission did not even address whether ISP-bound traffic was "exchange access" in the *ISP Remand Order*. There, it found only that ISP-bound traffic is "information access" within the meaning of § 251(g), and the paragraphs Verizon and BellSouth cite establish merely that ISP-bound traffic is interstate access in a generic sense, rather than in a statutory sense.

B. The Verizon/BellSouth Construction of "Reciprocal" Is Also Incorrect.

- Verizon and BellSouth also argue that compensation for ISP-bound traffic is not governed by § 251(b)(5) because it is not "reciprocal." This claim fails both legally and factually.
- Sections 251(b)(5) and 252(d)(2), by their terms, do not require any particular balance of traffic between the parties. What is "reciprocal" is the obligation to pay compensation, not the actual traffic balance – which, of course, may change dramatically from month to month. Section 251(b)(5) does not suddenly cease to apply if the balance of traffic tips to a certain level of imbalance. The basic scheme of the Act ensures full compensation for both parties for any call, whether the overall balance of traffic happens to be 100%-0%, 50%-50%, or 0%-100%. Indeed, the Commission clearly understood that the statute contemplated traffic imbalances, because the Commission adopted rules specifically addressing such situations. See *Local Competition Order* ¶¶ 1111-13.
- Equally important, the ISP-bound traffic costs about which Verizon and BellSouth complain have *nothing to do* with the reciprocal compensation arrangement. Specifically, Verizon claims (at 41-42) that the average holding times of ISP-bound calls is significantly longer than for voice calls, which requires Verizon to add switching capacity, and that these costs are "uncompensated." But even if this were true, these increased costs are a function of the fact that Verizon's *own customers* are making more calls to ISPs and using Verizon's switches more, and thus Verizon and BellSouth would incur these costs *regardless* of what sort of reciprocal compensation arrangement it has with CLECs. In other words, whether its arrangement consists of intercarrier payments or (as Verizon and BellSouth propose) bill and keep, Verizon and BellSouth would have to recover those costs of enhancing its own switching capacity from their own customers either way.
- As Verizon and BellSouth concede in a footnote (see Verizon/BellSouth Ex Parte at 43 n.34), the traffic imbalance between ILECs and paging carriers is also one-way, but the Commission has required "reciprocal" compensation in that context.

II. THE COMMISSION HAS NO AUTHORITY TO SINGLE OUT ISP-BOUND TRAFFIC FOR DIFFERENT TREATMENT UNDER SECTIONS 251(B)(5) AND 252(D)(2).

- Verizon and BellSouth suggest that, on remand from *WorldCom*, the Commission could impose the same scheme on ISP-bound traffic under §§ 251(b)(5) and 252(d)(2) that it imposed in the *ISP Remand Order* under § 251(g). Verizon and BellSouth have not explained, however, how the Commission could allow discriminatory treatment under § 251(b)(5) for one class of traffic versus another, by imposing bill and keep on ISP-bound traffic but not other traffic. The Commission should move expeditiously to an *across-the-board* bill and keep or other cost-based system that

would apply to all traffic. Verizon and BellSouth provide no reason for distinguishing ISP-bound traffic from other traffic.

- The Bells' principal argument (at 45-46) is that the Commission could find that CLECs should recover the cost of transport and termination from their ISP customers, and that the "additional" cost under § 252(d)(2) would therefore be zero (since those additional costs would have already been recovered from endusers). But this does not distinguish ISP traffic from any other traffic; any CLEC – or ILEC – could always recover its costs from its customer, which would always render the "additional" costs zero under § 252(d)(2).

III. THE VERIZON/BELLSOUTH SUGGESTION THAT THE COMMISSION IS WITHOUT AUTHORITY TO REQUIRE ILECS TO COMPLY WITH PAST PERIOD RECIPROCAL COMPENSATION OBLIGATIONS IS FORECLOSED BY SETTLED PRECEDENT.

- The suggestion by Verizon and BellSouth (at 53-57) that they can be required to pay reciprocal compensation for ISP-bound traffic, if at all, only on a prospective basis is plainly incorrect. The D.C. Circuit *held unlawful* the Commission's reliance on § 251(g) to exempt the Bells from their § 251(b)(5) obligations with respect to ISP-bound traffic. And the Supreme Court has long recognized that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965). *See also Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (reading *Callery* to embody the "general principle of agency authority to implement judicial reversals"); *Tennessee Valley Municipal Gas Association v. FPC*, 470 F.2d 446, 452 (D.C. Cir. 1972) ("If the policy of the . . . Act is not arbitrarily to be defeated by uncorrected Commission error, the [injured party] must be put in the same position that it would have occupied had the error not been made").
- Indeed, Verizon itself has already lost in the D.C. Circuit on the same arguments against retroactive liability in the wake of a judicial reversal that it makes here. *See Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001) (Verizon's argument "reduces to the assertion that the agency may not retroactively correct its own legal mistakes, even when those mistakes have been highlighted by the federal judiciary. But this is not the law."); *see also id.* (to adopt Verizon's position "would make a mockery of the error-correcting function of judicial review").

IV. ISP-BOUND VIRTUAL FX TRAFFIC IS GOVERNED BY § 251(b)(5) AND IS NOT SUBJECT TO ACCESS CHARGES.

- The suggestion by Verizon and BellSouth that CLECs must pay the originating ILEC access charges for virtual FX calls bound for ISPs is also incorrect, and should be rejected as a prospective rule. *See Verizon/BellSouth Ex Parte* at 57-63.

- First, the *ISP Remand Order* and the Commission's current reciprocal compensation rule, by their terms, encompass *all* ISP-bound traffic. Under the *ISP Remand Order*, the Commission purported to establish a single rule for all ISP-bound traffic under its § 201 authority (which it thought was saved by § 251(g)). Second, virtual FX calls are treated as local calls for all other purposes, and are exchanged over local interconnection trunks. As the Commission has recognized, it would be impractical to attempt to separate out this traffic from other traffic for reciprocal compensation purposes, and it would be even more impractical to attempt to impose access charges on such traffic.
- The suggestion by Verizon and BellSouth (at 60) that the state commissions have agreed that ISP-bound virtual FX traffic should be subject to access charges is flatly wrong. In fact, to AT&T's knowledge, only Massachusetts (which is on appeal) and Ohio have ordered CLECs to pay access charges to the originating ILEC in such circumstances. Many states, including California, Connecticut, Florida, Georgia, Michigan, New Jersey, Oregon, Tennessee, and Wisconsin, have ruled that the *ISP Remand Order* applies to such traffic.